

**BEFORE THE HEARING PANEL EMPOWERED BY THE STATE BOARD OF
EDUCATION PURSUANT TO SECTION 162.961 RSMo.**

,)	
by his parent, ,)	
)	
Complainants,)	
)	
v.)	
)	
SPECIAL SCHOOL DISTRICT OF)	
ST. LOUIS COUNTY)	
)	
and)	
)	
FERGUSON-FLORISSANT SCHOOL)	
DISTRICT)	
)	
)	
Respondents.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

The Hearing Panel, after hearing the evidence in this matter on December 13-15, 2004, makes the following Findings of Fact and Conclusions of Law and issues the following Decision and Order:

FINDINGS OF FACT

I. PARTIES

1. The Parent has been a resident of, and domiciled within the boundaries of the Ferguson-Florissant School District ("FFSD") during all times relevant to this due process

proceeding. Student has resided with Parent during this period.

2. Torey Cummings and Jacqueline Kutnick-Bauder of The Children's Legal Alliance, 4232 Forest Park Parkway, St. Louis, MO 63108 represented the Parent.

3. FFSD is a Missouri school district organized pursuant to Section 162.461 *et seq.* RSMo.

4. Peter G. Yelkovac of the Law Firm of Tueth, Keeney, Cooper, Mohan & Jackstadt, PC , 425 S. Woods Mill Road, Suite 300, St. Louis, MO 63017 represented FFSD.

5. The Special School District of St. Louis County ("SSD") is responsible for identifying and serving special education students in FFSD, pursuant to the directives of the Missouri Department of Elementary and Secondary Education ("DESE"), 2004 Missouri State Plan for Special Education, Reg X ("DESE State Plan").

6. Counsel for the SSD is John F. Brink of the Thomeczek Law Firm, LLC, 1120 Olivette Executive Parkway, Suite 210, St. Louis, MO 63132.

7. The Hearing Panel members in this proceeding are:

Pamela S. Wright, Chairperson

Charlene Luster, Hearing Panel Member and

Fred Davis, Hearing Panel Member.

II. TIMELINE INFORMATION AND PROCEDURAL HISTORY

8. Parent originally filed a due process complaint with DESE on April 14, 2004 and on August 31, 2004 submitted a First Amended Due Process Complaint.

9. DESE calculated the initial timeline for the issuance of an opinion to be June 1, 2004. On May 27, 2004, the counsel for the Parent made written request for an

extension of the timeline to October 11, 2004, with hearing dates of September 9-10, 2004. On September 10, 2004 the parties orally requested an extension of the timeline from October 11, 2005 to January 21, 2005, with hearing dates of December 13-15, 2004.

At the conclusion of the hearing on December 15, 2004, the parties agreed to extend the timeline from January 21, 2005 until January 28, 2005 to accommodate the schedule of the court reporter. When the court reporters experienced additional problems, the parties on January 13, 2005 agreed to extend the timeline from January 28, 2005 to February 3, 2005. The Hearing Panel issues its opinion within the new deadline.

10. The parties presented certain Pre-Hearing Motions:

(a) SSD filed a Motion to Quash on October 14, 2004, with Briefs filed by both parties. The Chairperson issued an Order dated October 26, 2004 denying the Motion to Quash.

(b) Parent filed a Motion to Compel Discovery And Related Costs on November 10, 2004, with a Response filed by SSD on November 15, 2004. The Chairperson denied the Motion to Compel on November 17, 2004.

(c) On December 8, 2004, Parent filed a Motion in Limine to Exclude Exhibits R-1 (Deposition Testimony of Parent) and R-2 (Summary of Referrals for Problem Behaviors). Two days later, SSD filed its Response. At the beginning of the hearing on December 13, 2004, the Chairperson ruled to exclude Exhibit R-1 in its entirety exception for Admissions of Party Opponent (to be submitted to the Hearing Panel after the hearing) and ruled to exclude Exhibit R-2.

11. The parties presented Joint Exhibits more than five business days in advance of the hearing along with the Statement of Issues and Lists of Witnesses. The parties also submitted certain Stipulations.

III. The Issues of the Due Process Proceeding

12. The issues to be resolved by the Hearing Panel are as follows:

(A). Whether the decision that Student is not a child with a disability as defined by IDEA under the disability category of emotional disturbance (“ED”) met the procedural and substantive requirements of IDEA?

(B) Did SSD and FFSD fail to identify, locate and evaluate Student for special education during the time that Student attended FFSD in the 2002-2003 and 2003-2004 school years?

BACKGROUND

Family & Friends

13. Student resides with his mother (previously described as “Parent”) , sister, three brothers, nephew, uncle and grandfather, an African-American family. *Exs. J-84; R-1 at 6-8, 55; Tr. Vol. II:136.* Parent and her family face many challenges, including financial hardship; a demanding work schedule with varying and unusual hours for Parent; a history of special education needs among family members, including Parent herself; and significant and time-consuming family responsibilities involving caring for a mentally retarded adult and an elderly adult with serious physical and mental health problems. *Tr. Vol. I, pp. 135-136, 141, 146.* Student rarely sees his father. *Ex. J-84 at 233. Because of Parent’s work schedule, Student and Parent do not spend much time together. Ex. J-84 at 232.*

14. Parent describes Student’s personality: charming, witty, laughs a lot. *Ex. R-1 at 12.* Parent describes her relationship with Student as good. *Ex. R-1 at 13.* Similarly, she states that Student gets along fine with his brothers and sister. *Ex. R-1 at 13.* Student generally minds and respects the Parent. *Ex. R-1 at 19; 77.* If Student does not

mind, Parent withholds clothes, shoes or money. *Ex. R-1 at 19.* His initial response is to be mad but he does start acting right. *Ex. R-1 at 19.* 15. According to Parent, his behavior at home is fair. *Ex. R-1 at 17.* Student at times will pout when Parent tells him to do something. *Ex. R-1 at 18.* When he pouts, he will cry and slam doors but this does not happen often. *Ex. R-1 at 18; 31.* One of her other sons does the same thing. *Ex. R-1 at 18.* Parent testified that Student can behave appropriately if he wants to do so; he generally does behave appropriately. *Ex. R-1 at 36.*

16. Outside of school, Student does not get physically aggressive with other people. *Ex. R-1 at 20.* He gets angry at times but Student is pretty much the same as other kids in that regard. *Ex. R-1 at 20.* According to Parent, Student has neither physically harmed anyone nor destroyed property. *Ex. R-1 at 20-21.*

17. Student has friends and makes them fairly easily. *Ex. R-1 at 15.* Parent testified he generally gets along with kids at school okay as well as kids in the neighborhood. *Ex. R-1 at 15.*

18. Student cares for his grandfather after school by feeding him, making sure he takes a bath, testing his need for insulin, and giving shots when necessary. *Ex. R-1 at 24-26, 68.* Parent pays him \$50.00 every two weeks for taking care of his grandfather. *Ex. R-1 at 24.* Student does a good job of taking care of his grandfather. *Ex. R-1 at 68.* Student has cut grass and shoveled snow the last 2-3 years on his own initiative to make money. *Ex. R-1 at 21-23.*

19. Parent assigns certain chores for Student to perform: sweep out the living room; clean his room, take out the trash, mop the floors. *Ex. R-1 at 47.* Like her other kids, Student performs these jobs "sometimes okay." *Ex. R-1 at 47.*

Education

20. Student has attended school in the FFSD since February 6, 2002.

(Stipulation). Student began attending Ferguson Middle School as a seventh grade student at the start of the 2002-2003 school year. *(Stipulation)*.

21. On January 28, 2003, Student was suspended through June 3, 2003, for fighting with another student before school. *Exs. J-20; J-21; J-96 at 30*. Instead of being required to serve his suspension at home, Student was assigned to the Positive Alternative Learning program at Ferguson Middle School from 3-6 p.m. ("PM-PAL"). *Ex. J-21; Stipulation*. The alternative education programs at FFSD use the regular curriculum. *Tr. Vol. I:198*. FFSD established the PAL program to provide an education for students who were long-term suspended and to try to "remediate" problems. *Ex. J-98 at 391; Tr. Vol. II:7-8*. The PM PAL program was created when the number of students in the PAL program exceeded capacity. *Tr. Vol. II:7*. Student attended the program from February 17, 2003 until May 28, 2003. *Stipulation*. There were approximately 11-14 students in the program. *Stipulation*. Parent did not indicate on the In-Take Evaluation Form for FFSD's alternative education programs that Student was displaying sadness or any other signs of depression but she did express concerns regarding his attitude and anger management. *Ex. J-23*.

22. Aggression Replacement Training ("ART") is a component of FFSD's alternative education programs. *Ex. J-98 at 391*. The ART curriculum encourages honesty and integrity and teaches students alternatives to aggression. *Tr. Vol. III:5*. The curriculum deals with anger management, empathy, character education, and social skills. *Tr. Vol. I:93, 216*. A goal of the ART program is to teach skills to students to meet behavioral expectations. *Ex. J-98 at 391*.

23. Ms. Rohlfing, Principal of Ferguson Middle School, noted that many of the

students in her school believe in a philosophy that the best way to deal with a problem is to fight it out. *Tr. Vol. I:259*. For that reason, at Ferguson Middle School they try to teach social behaviors for the school environment so that students understand that it is not okay to fight. *Tr. Vol. I:259*.

24. Student was retained in the 7th grade at the start of the 2003-2004 school year because of academic failure. *Ex. J-32; Tr. Vol. I:199-200*. He failed summer school because he did not turn in his homework – given to Parent for Student to complete after he was kicked out of school for harassment of another student. *Tr. Vol. I: 199-201*.

25. The GEAR-UP program was developed by Ms. Rohlfing for students like Student who had been retained in 7th grade. *Tr. Vol. I:207; Tr. Vol. II:20-21*. The program provided students the opportunity to complete both 7th and 8th grade during the 2003-2004 school year. *Tr. Vol. II:20*. There were approximately seventeen students in the GEAR-UP program during the 2003-2004 school year. *Tr. Vol. I:207; Tr. Vol. II:20*.

26. On September 18, 2003, Student was suspended for participating in a fight at dismissal time. *Exs. J-34; J-35: J-96 at 301-302*. The fight involved some of the same students as the fight on January 28, 2003. *Tr. Vol. I:228; Tr. Vol. II:12*. Student and another student planned the incident, which was related to the January 28 incident. *Ex. J-34 at 89; Tr. Vol. I:282-283*. Student's role in the incident was mainly that of an instigator. Student was assigned to the PM-PAL program from October 27, 2003 until January 16, 2004. Stipulation. Parent did not indicate on the In-Take Evaluation Form used for the alternative education programs that Student was displaying sadness or any other signs of depression; she expressed no specific concerns regarding behavior, social or academic issues. *Ex. J-41*. Student received passing grades. *Ex. J-44*. There were approximately 5 students in the program. Stipulation.

27. Eddie Thomas was Student's teacher while he was in the PM-PAL program from

October 27, 2003 until January 16, 2004. Mr. Thomas described Student as likeable, engaging, and loquacious, and that he liked being recognized. *Tr. Vol. III:31, 33.* Mr. Thomas never saw Student have days when he had low energy and Student did not talk about feeling depressed. *Tr. Vol. III:34, 36-38.* While with Mr. Thomas, Student assumed responsibility for arriving early each day to obtain textbooks from their place of storage. *Tr. Vol. III:31-32.* Mr. Thomas never saw Student blow up and described Student as being someone who thought things through. *Tr. Vol. III:35.*

28. At the beginning of the second semester of the 2003-2004 school year, Student had completed two semesters of seventh grade and was promoted to the eighth grade. *Tr. Vol. I:208.* He received one A, one B, two Cs and four Ds. *Tr. Vol. I:208.*

29. Student attended the GEAR-UP program, a regular education environment, from January 21, 2004 until March 10, 2004. *Stipulation; Tr. Vol. I:208.* He received passing grades during that time: one A; one B; two Cs and 4Ds. *Ex. J-57.*

30. On March 10, 2004, Student was suspended for threatening a teacher ("She doesn't know where I come from"; "Things could happen") and was assigned to the Student Support Center ("SSC") through June 8, 2004. *Exs. J-55; J-56; J-60; J-96 at 304.* The SSC is an alternative school for students that have been suspended. *Ex. J-98 at 395-403; Tr. Vol. III:4.* Parent did not indicate on the In-Take Evaluation Form that Student was displaying sadness or any other signs of depression. *Ex. J-75.* Parent responded "to stay in school" when asked if she had concerns such as behavior, social or academic. *Ex. J-75.* Student's expressed concern on the Form was "to move on to next grade." *Ex. J-75.*

31. Ms. Rohlfinding characterized Student as funny; witty; well-dressed; had a lot of friends. She saw him in the hallways and in the cafeteria. He was always cooperative and respectful to her but she was aware of referrals for disrespect shown to staff and bus drivers. *Tr. Vol. I:275; Tr. Vol. II:31-32*. The only time that she saw Student despondent when he was told that he would not pass summer school and go on to 8th grade in the fall of 2003-2004. *Tr. Vol. I:276*.

32. During the period from February 28, 2002 until December 12, 2004, Student received 28 disciplinary referrals of varying degree of seriousness *Exs. J-96 at 298-304; P-1*. Ms. Rohlfinding testified that Student's disciplinary record during this time period was not extensive compared with many students that she dealt with in the school environment. *Tr. Vol. I:241* (noting that 17 eighth grade students received ten or more referrals in one quarter); *Tr. Vol. II:18-19, 24-25*. Ms. Rohlfinding also testified that the kinds of behaviors for which Student received referrals were not out of the ordinary from other misbehavior at Ferguson Middle School. *Tr. Vol. I:245-246; Tr. Vol. II:16, 19, 34* (63 students received standard four suspensions during the 2003-2004 school year). Ms. Rohlfinding has many years of experience in middle school settings, including direct involvement in disciplinary matters. *Tr. Vol. I:250, 254; Tr. Vol. II:25*. With respect to long term suspensions, Ms. Rohlfinding testified that approximately 15% of students at Ferguson Middle School had been long-term suspended three semesters in a row. *Tr. Vol. II:36*.

33. Ms. Rohlfinding did not observe Student display signs of depression. *Tr. Vol. I:277-279*. No one, including Parent, ever told Ms. Rohlfinding that they believed Student was depressed. *Tr. Vol. I:279*. Ms. Rohlfinding does not believe Student needs special education. *Tr. Vol. II:26*. The panel finds Ms. Rohlfinding's testimony regarding Student's experience at Ferguson Middle School to be very credible.

34. Cathy Mitchell was one of Student's teachers at the SSC. Ms. Mitchell testified that Student always had a good appetite, was very energetic, and focused. *Tr. Vol. III:9-10*. She never saw Student out of control or blow up from anger. *Tr. Vol. III:11-12*. Student was motivated to do well while at the SSC by his desire to progress to high school. *Tr. Vol. III:20, 24*. Student received passing grades while at the SSC. *Ex. J-82*. The panel finds credible Ms. Mitchell's testimony that Student does not require a modified curriculum or structured setting in order to be successful. *Tr. Vol. III:16-17*.

35. At Parent's request, Student has attended McCluer South Berkeley High School during the 2004-2005 school year instead of McCluer High School. *Ex. J-96; Tr. Vol. I:94-95; Tr. Vol. II:144*. Through December 12, 2004, Student had received four disciplinary referrals, resulting in 2 days of out of school suspension and 3 days of in school suspension. *Exs. J-96 at 304; P-1*. Michelle Strong, Student's counselor, testified that Student's disciplinary record during this period of time does not stand out; it's typical if not better than some (freshmen). *Tr. Vol. III:62, 72*.

36. Ms. Strong has had frequent contact with Student and his teachers. Student is comfortable talking with Ms. Strong. *Tr. Vol. III:59, 62*. Student has not told Ms. Strong of feelings or conduct related to depression. *Tr. Vol. III:59*. Although social worker services are available at McCluer South Berkeley, a referral for such services has not been made for Student because Ms. Strong has not seen the kinds of problems that would warrant such a referral. *Tr. Vol. III:70-71*. Student's behavior has not justified a need for group counseling. *Tr. Vol. III:80-81*.

37. Student's report card for the first quarter of the 2004-2005 school year shows that he received three Fs and an incomplete. *Ex. J-96*. Approximately 1/3 of the

freshman class at McCluer South Berkeley received three or more Fs in the first quarter of the 2004-2005 school year. *Tr. Vol. III:61, 76.*

38. Ms. Strong's practice is to have the freshman with 3 or more failing grades to get weekly progress reports from their teachers to be turned into the guidance office. A letter is sent home to parents, including follow up on upcoming tests, missing assignments, classroom behavior. *Tr. Vol. III: 81 (revised).*¹ She has already started monitoring Student's academic progress, has sent a letter to Parent and has talked with Student regarding the consequences of academic failure.

Evaluation by UMSL

39. Based on her own school experience and experience with two of her children, Parent knows what an IEP is and demonstrated some understanding of special education. *Ex. R-1 at 26-28; Tr. Vol. II:146.* A couple of years ago, Parent's daughter raised with her the issue of getting help for Student by having him tested as was done for two of her brothers. *Ex. R-1 at 32-33.* Parent never followed up on that suggestion. *Ex. R- 1 at 33.*

40. Parent never put anything in writing to SSD, FFSD, or any other school district where she stated that she thought Student needed special education. *Ex. R-1 at 31.* She does not recall making an oral request to any school district for a special education evaluation. *Ex. R-1 at 31.*

41. No one from any school district Student has attended told Parent that Student needed special education. *Ex. R-1 at 32.*

¹Actual academic probation is not available until students are 16 years old. *Tr. Vol. III: 81.*

42. There was no evidence that FFSD or SSD personnel expressed concern about Student's behavior or performance in accordance with the established child find or special education referral system.

43. In a letter dated April 2, 2004, to Ms. Rohlfinding, Torey Cummings, an attorney representing Student and Parent, requested that Ms. Rohlfinding make a referral to SSD to "evaluate Student for disabilities." *Ex. J-61*. The request for an evaluation contained in the April 2, 2004 letter was the first time anyone requested that Student be evaluated to determine whether he was a child with a disability under the IDEA. Ms. Rohlfinding immediately followed up on the request. *Tr. Vol. II:27*.

44. On April 14, 2004, the Missouri Department of Elementary and Secondary Education ("DESE") received a request for a due process hearing filed on behalf of Student. *Exs. J-66; J-67*. As part of the proposed resolution, Petitioners requested that SSD complete an evaluation of Student, including the areas of cognition, academics/achievement, and social/emotional. *Ex. J-66 at 164*.

45. The evaluation process was initiated and a data packet was completed. *Ex. J-73; Tr. Vol. II:85-86*. By letter dated April 27, 2004, Parent was notified that a referral would be made to SSD for a special education evaluation. *Ex. J-74*. Assessment was requested in the areas of cognition, pre-academic/academic, and emotional/affective. *Ex. J-79*. Written consent to conduct an initial evaluation was received by SSD on May 24, 2004. *Ex. J-79*.

46. SSD hired and paid for Community Psychological Services at the University of Missouri-St. Louis ("UMSL") to do an in-depth mental health evaluation of Student. *Tr. Vol I: 22-23, 27-28*.

47. Megan Schacht, a doctoral student in child clinical psychology with almost four years of experience in conducting psychological evaluations, completed the UMSL evaluation of Student for SSD. *Tr. Vol. I: 24-25*. Ms. Schacht has completed 120-130 psychological evaluations, including 68 on children or adolescents. Sixty of those 68 were evaluations for SSD. *Tr. Vol. I: 25-26*. SSD has been contracting with UMSL and Ms. Schacht to do mental health evaluations for the past two years.² *Tr. Vol. I: 27*. Janice Brooks of SSD testified that Megan Schacht has extensive experience doing psychological evaluations, and that she is well trained, does good evaluations, and writes good reports. *Tr. Vol. II: 56*. Dr. Jerry H. Dunn, licensed psychologist, supervised Ms. Schacht's work and signed the UMSL evaluation. *Ex. J-84 at 242*.

48. Parent reported to Ms. Schacht that Student experienced periods of sadness that lasted a few days at a time and occurred five or six times each month. *Ex. J-84 at 230*. Student reportedly had experienced the periods of sadness for the past two years. *Ex. J-84 at 230; Tr. Vol. II: 163*. The periods were typically triggered by Student wanting something or wanting to do something that he could not or was not allowed to do. *Ex. J-84 at 230*. Student reported similar periods of sadness. *Ex. J-84 at 231*. There was no evidence that Parent or Student ever reported to school personnel that Student was experiencing such episodes of sadness.

49. Student reported to Ms. Schacht that he did not like Ferguson Middle School. *Ex. J-84 at 230*. He told her that the teachers are "hateful, mean and out to get him in trouble." *Ex. J-84 at 230*. Student complained that the classes were "dumb" and it

²In twelve mental health examinations by Ms. Schacht, she has found DSM-IV diagnoses in every exam. *Tr. Vol. I: 150*.

“frustrated him” that they made him do too much work.” *Ex. J-84 at 230*. Parent reported to Ms. Schacht that Parent attributed a majority of Student’s difficulties to conflicts between her son and the principal. *Ex. J-84 at 227*.

50. Student’s cognitive functioning was assessed to be in the low average range. *Ex. J-84 at 239, 243*. The UMSL evaluator testified that children with Student’s IQ normally receive grades of Cs and Ds or low average. *Tr. Vol. I: 148*.

51. The UMSL evaluation noted that Student had experienced numerous stressors throughout his life, including financial instability, the family being homeless and living in their car and a shelter, transferring schools every two years, home break-ins, gang activity in the neighborhood, and an instance where his mother was hit with a gun and the gun was pointed at Student during a break in. *Ex. J-84 at 239*.

52. Student also told Ms. Schacht that aside from sleep difficulties when he is depressed, he typically goes to bed between 1:00 a. m. and 2:00 a. m. He also reported that he wakes up at 5:30 a.m. during the school year and between 9:00 a. m. and 1:00 p. m. during weekends and summer. He indicated that he has difficulty waking up and admitted that he sometimes falls asleep in class. *Ex. J-84 at 234*.

53. The UMSL evaluators diagnosed Student with Depressive Disorder Not Otherwise Specified³ and Intermittent Explosive Disorder under the DSM-IV. *Ex. J-84*. While the UMSL evaluators did not conclude that Student is an imminent risk for self- or other directed harm, he does pose a serious continued risk for self-or other directed harm. *Ex. J-84 at 240*.

³Student would have met DSM-IV criteria for Major Depressive Episode but for the duration requirement. *Ex. J-84 at 240; Tr. Vol. II: 205*. In order to qualify for a diagnosis of Major Depressive Episode, an individual must experience depressive symptoms for 14 consecutive days. Student had eight of the nine required symptoms for 15-28 days a month, but he did not report experiencing them for 14 consecutive days. *Tr. Vol. I: 41-42; Tr. Vol. II: 205*.

54. Intermittent Explosive Disorder is an impulse control disorder wherein Student experiences angry aggressive outbursts that are grossly out of proportion to precipitating events. *Ex. J-20 at 050; Ex. J-34 at 085; Ex. J-84; Tr. Vol. I: 55-56; Tr. Vol. II:229.*

Student's symptoms of intermittent explosive disorder included two very aggressive explosions wherein he was unable to stop physically attacking others, even when multiple authority figures attempt to restrain him. *Id.* Student reported to Ms. Schacht: "If I'm arguing and someone's not around to stop it, it's gonna be a fight" *Ex. J-84 at 232; Tr. Vol. I: 56-57.* Student indicated to Ms. Schacht that he prefers the intervention of being "put in anger management" (i.e., timeout) when he begins to get upset because this practice allows him to calm down. *Ex. J-84 at 230.* He also confirmed what had been reported to Ms. Schacht by Ferguson Middle School administrators Ms. Rohlfing and Ms. Kelly that Student has been primarily involved in altercations with two or three other boys. *Tr. Vol I: 87.*

55. The UMSL evaluators based their diagnostic conclusions on a large variety of psychological tests conducted with Student, interviews of Student and Parent, projective testing, conversations with six teachers and administrators, and Student's school records back to fifth grade. *Tr. Vol. I: 28-39.*

56. Recommendations by the UMSL evaluators are as follows in summary form:

a. Student could benefit from psychotherapy to address anger management skills, depression and deficits in social skills. However, they questioned whether therapy would be successful because Student has little motivation to change and does view his aggression as a source of difficulty for him. ⁴

⁴On *Ex. J-84 at 239*, Ms. Schacht noted: On a sentence completion, he (Student) stated: *When I get in trouble, my mom gets me out.*"

b. Parent reported at the time of the valuation in the summer of 2004 that she had an appointment for Student to see a psychiatrist. Parent was encouraged to keep the appointment to assess if there is any benefit for prescription drugs to alleviate his depression.⁵

c. Group therapy focusing on social skills and anger management. Group therapy within the school setting could also help Student to develop and maintain supportive peer relationships.

d. A plan should be developed at school to help Student have a place to go to “cool down” for about 20-30 minutes.

e. The school and Parent need to be prepared for his problematic behavior with consequences to be developed. Student needs to be aware of what is not acceptable behavior and what the consequences will be if he does misbehave.

⁵Parent testified at her deposition taken on October 8, 2004 (more than 3 months after the completion of the UMSL report) that he has seen neither a psychologist nor a psychiatrist because she had been busy with taking care of her family and working. *R-1 at 38-39*. At the hearing, Parent testified differently: She had taken Student to see a psychiatrist named Dr. Leon but the doctor did not seem to understand what the Parent was saying to her. *Tr. Vol. II: 139*. Parent then scheduled Student to see another doctor but forgot about the appointment the first time. Another appointment was made but they drove to the doctor’s building but gave up when the entrance could not be found. *Tr. Vol. II: 140*. She did not make a third attempt with that doctor because with Medicaid, only two missed appointments are allowed. *Tr. Vol. II: 140*. She also admitted that she had concerns about taking Student to see a psychiatrist because she had gone as a child and the doctor did not believe her. *Tr. Vol. II: 140*.

f. It is important for Parent to validate Student's feelings of sadness or anger but not the behaviors.

g. Although Student does not meet the criteria for a learning disability, he would benefit from tutoring in his weaker areas of math and reading comprehension skills.

h. Since Student report frequent thoughts of suicide and that he has once made a small cut on his wrist, care givers should continue to monitor his mood. *J-84 at 241-242.*

Student's Special Education Eligibility Conference

57. On August 20, 2004, a multi-disciplinary team met to determine whether Student met the criteria for an educationally disabling condition. *Ex. J-87 at 251, 252.* Those in attendance included Ms. Schacht; Janice Brooks, SSD Effective Practice Specialist; Diane Brogan, teacher (*Ex. J-50*); Lisa Frey, teacher (*Ex. J-8*); Lucinda Betts, counselor; Tracy Rohlfing; Parent; Student; Kelly Grigsby, SSD Area Coordinator; Victoria Weir, Ferguson Florissant Liaison; Vicky McNamara, SSD Director; and Torey Cummings, attorney for Parent and Student.⁶ *Ex. J-87 at 254.*

58. Chairperson of the multi-disciplinary team, Ms. Brooks has extensive experience conducting assessments regarding emotional disturbances, making DSM diagnoses, and working with persons with depression. *Tr. Vol. II:69-75, 78, 81.* She has worked in the FFSD in a middle school setting as a special education diagnostician. *Tr. Vol. II:70.* Ms. Brooks has participated in more than 100 conferences to determine

⁶In their well-drafted Brief, the attorneys for Parent correctly pointed out that none of the FFSD teachers or administrators present at the eligibility conference had a degree or background in mental health. We, however, do not see that as an impediment to making a sound decision

eligibility for an emotional disturbance. *Tr. Vol. II:74*. The panel finds that Ms. Brooks was a very credible witness.

59. The multi-disciplinary team also considered whether Student met DESE criteria for an emotional disturbance. *Ex. J-87 at 252, 255*. The team noted that Student had displayed aggressive behaviors at times, but determined that the behaviors were consistently linked with a specific group of peers and related to an effort to maintain social standing. *Ex. J-87 at 252*. The team's determination is consistent with Ms. Schacht's conclusion that any aggressive tendencies by Student "developed as a protective mechanism and serve him quite well," *Ex. J-84 at 241; Tr. Vol. I:114*; Student's statement to Ms. Schacht that his fights primarily involved a few students in particular because they "thought they were tough," (*Ex. J-84 at 230*); and the observations of school personnel. *Ex. J-84 at 228; Tr. Vol. II:12*.

60. With respect to the diagnosis of Depressive Disorder, Not Otherwise Specified, the multi-disciplinary team determined that the depression was not present across all settings. *Ex. J-87 at 253*. The team noted that classroom teachers had not noted evidence of sadness. *Ex. J-87 at 253*. The team determined that Student's school difficulties were not related to depression. *Ex. J-87 at 253*.

whether Student's diagnosed mental conditions impact his school performance.

61. In finding Student ineligible for special education services, SSD utilized an “Eligibility Checklist for Emotional Disturbance” which adds additional restrictive language to DESE’s emotional disturbance criteria. *Ex. J-87, at 257-258; Tr. Vol. II: 61-65.* Included in SSD’s additional criteria is language stating that a child’s inappropriate behavior or feelings under normal circumstances must be “psychotic or bizarre.” *Id.* Ms. Brooks testified that the additional language originated with SSD and is not found in the DESE regulations.⁷ *Tr. Vol. II, pp. 61-65.*

62. An Evaluation Summary was prepared by Ms. Schacht and Janice Brooks after the August 20, 2004 meeting. *Ex. J-87; Tr. Vol. II:51; Tr. Vol. I:73.* The Summary includes the same supports summarized in Finding of Fact (“FF”) #51 (recommendations by the UMSL evaluators) except for deletion of the need for group therapy to help with anger management.

Expert testimony by Dr. Jefferies Caul

63. Petitioners offered the testimony of Dr. Jefferies Caul, a clinical child psychologist with over 20 years of experience and the former Director of Psychological Services at St. Louis University Cardinal Glennon Children’s Hospital. Dr. Caul conducts psychological assessments and provides clinical therapy. He also works closely with a number of school districts, providing training, consulting, and psychological evaluations of students. *Tr. Vol. II: 184-188.*

⁷ As noted later in this opinion, the Hearing Panel reached its decision without using the SSD Eligibility Checklist.

64. Dr. Caul reviewed Student's extensive school records from University City School District and FFSD, the UMSL evaluation, SSD records, and depositions of Ms. Rohlfing and Ms. Brooks. *Tr. Vol. II: 191*. Dr. Caul also met with Student and Parent, and spoke with Ms. Schacht and Dr. Dunn from UMSL about their evaluation and diagnoses. *Tr. Vol. II: 197, 201*. Based on his interviews, conversations, and record reviews, as well as his education, experience, and psychological expertise, Dr. Caul reached the same conclusions as the UMSL evaluator.⁸ *Tr. Vol. II: 205*. Dr. Caul commended the UMSL evaluation as "one of the best reports [he has] seen in a long time." *Tr. Vol. II: 194*. He also testified that it was very extensive, thorough, competent, and impressive. *Tr. Vol. II: 192*. He would be very surprised if other clinical psychologists looked at the UMSL evaluation report and conclude Student is not depressed but he did admit that a number of the instruments used in the evaluation do not indicate that he is depressed. *Tr. Vol. II: 256*.

65. Dr. Caul testified that Student "is a very depressed young man, and that his depression is pervasive." He explained that Student experiences a "tremendous amount of pain" and an "inability to function day to day." *Tr. Vol. II: 205, 211*. Dr. Caul agreed with the UMSL evaluator that Student's underlying depression affects him in all settings. His depression may ebb and flow, but it is neither transient nor situational. *Tr. Vol. II: 217, 292*.

66. Dr. Caul conceded certain inconsistencies with the diagnosis of depression: Parent's testimony that Student likes high school; that he gets up on his own to go to school; Student's willingness to help take care of his grandfather by checking his blood

⁸Ms. Schacht admitted in her testimony that another professional could look at the same information and conclude that Student did not have depression. *Tr. Vol. I: 151*.

sugar levels, administering insulin shots; his motivation to seek yards to mow and snow removal jobs. *Tr. Vol. II: 262-263; 278.*

67. Dr. Caul agreed that Student's claim of boredom with school could affect his task completion. *Tr. Vol. II: 259-260.* He also testified that Student's lack of sufficient sleep on a regular basis could impact his school performance. *Tr. Vol. II: 302.*

68. Dr. Caul conceded that the criteria for intermittent explosive disorder require episodes involving serious physical assaults. *Tr. Vol. II: 276.* He was surprised that Parent testified at her deposition that Student had never physically harmed anyone. *Tr. Vol. II: 277.*

69. After reviewing the suggested school supports from the Evaluation Summary (also contained in the UMSL report except as previously noted in FF #57) , Dr. Caul testified that he would certainly agree with those recommendations. *Tr. Vol. II: 301.* He offered no additional ones that might be used to help Student in the school setting. *Tr. Vol. II: 301.* He also added that Student needs to see a pediatric or adolescent psychiatrist to look into medication. *Tr. Vol. II: 301.* Remarkably for someone whom Dr. Caul described "as a very depressed young man" and "an inability to function day to day" he did not talk to the Parent about the need for Student to be taken to a medical doctor. *Tr. Vol. II: 300.* Similarly, he did not talk to her about the Student's need for psychotherapy. *Tr. Vol. II: 300.*

Need for Special Education

70. Diagnostic criteria for Intermittent Explosive Disorder require several discrete episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property. *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV")*, at 612. "Several" episodes means more than two such episodes and

a serious assaultive act requires a physically aggressive assault. *Tr. Vol. I:113; Tr. Vol. II:249, 274.* Purposeful behavior is distinguished from Intermittent Explosive Disorder by the presence of motivation and gain in the aggressive act. *DSM-IV* at 611.

71. The evidence does not show that Student meets the criteria for Intermittent Explosive Disorder. Student's mother did not describe conduct meeting the criteria either at the hearing or as reported to Ms. Schacht. Neither Ms. Schacht nor Dr. Caul identified several incidents during which Student seriously physically assaulted anyone or destroyed property. To the extent that Student has engaged in aggressive behaviors, the behaviors are not impulsive or explosive. *Tr. Vol. I:114; Tr. Vol. II:100-101; Tr. Vol. III:35; Ex. J-84 at 230, 241.*

72. It is not clear to us whether Student is depressed.⁹ Dr. Caul's conclusion is suspect because his testimony demonstrated that he did not know the Student nearly as well as he thought. He bases his opinions after seeing Parent and Student for one 90 minute visit. Dr. Caul was neither credible nor persuasive. The UMSL evaluation contained significant information that was inconsistent with a diagnosis of depression. Ms. Schacht did not observe signs of depression when she evaluated Student and agreed that the most recent reports from school personnel at the time of her evaluation did not show depression. *Tr. Vol. I:111-112.* Ms. Schacht noted that depression often goes away. *Tr. Vol. I:173.* While we found Ms. Schacht to be credible witness, she was not persuasive on the issues of depression and intermittent explosive disorder and their impact on his school performance. Janice Brooks disagreed with the conclusions of Ms.

⁹We, however, take seriously Student's statement to Ms. Schacht regarding his small cut to the wrist. Parent should be urged to overcome her doubts about psychotherapy and take Student to UMSL where he can be treated, with fees to be based on a sliding scale. *Tr. Vol. I: 274.*

Schacht and Dr. Caul. Although Parent told Ms. Schacht that Student had experienced periods of sadness for two years, there was no evidence that she ever told school personnel of such sadness or any concerns she had that Student was depressed. There is no evidence that Student ever told school personnel that he has periods of sadness or thoughts of suicide.

73. Even if Student is depressed, the depression has not manifested itself at school. Parent testified that Student enjoys school, gets going in the morning on his own, is able to make friends easily, and generally gets along with kids at school. *Ex. R-1 at 14, 15, 99.* School personnel consistently described him as a happy, energetic, and likeable student. *Ex. J-84 at 229; Tr. Vol. I:275; Tr. Vol. III:20, 31, 58.* The descriptions by school personnel were consistent with Parent's testimony that Student is charming, witty, and laughs a lot. *Tr. Vol. II:150.* With minor exceptions, school personnel did not see Student exhibit signs of depression, sadness, or anxiety. There was no evidence showing that Student has displayed a mood of unhappiness at school. Student has not exhibited observable signs at school showing that he is, or ever was, depressed.

74. There was no evidence showing that Student's misbehavior corresponded to times when he may have been experiencing periods of sadness or depression. Common sense dictates that at least some of the misbehavior and poor academic work can be explained by Student's consistent lack of sleep. The panel finds credible the testimony of school personnel and Parent that Student is able to control his behavior.

75. FFSD has put in place supports for Student at McCluer South Berkeley that are consistent with suggestions made in the Evaluation Summary. *Ex. J-87 at 253; Tr. Vol. III:63-69.* The supports include a place for Student to cool down, but he has rarely

needed to use the support for that purpose *Tr. Vol. III:66, 69*. The same supports are used with other regular education students. *Tr. Vol. III:63-69*.

76. FFSD offers students at McCluer South Berkeley the opportunity to participate in the GEAR UP program. *Tr. Vol. III:54-57*. The comprehensive program includes after school academic tutoring. *Tr. Vol. III:57*. Although Student signed up for the program, he has not participated on a regular basis. *Tr. Vol. III:58*.

77. Student has achieved academically at a rate that, in some instances, is better than what would have been expected given Student's cognitive abilities. *Exs. J-25; J-84 at 243-244*.

78. Student's behavior and academic performance during the time he has attended school in the FFSD does not demonstrate a need for special education.

CONCLUSIONS OF LAW

1. The Individuals with Disabilities Education Act ("IDEA"), 20 U. S. C. Section 1400 *et seq.*, the IDEA Regulations, 34 C. F. R. Parts 300-301 and the *State Plan for Part B of the Individuals with Disabilities Education Act* ("State Plan") sets forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District and DESE, in providing special education and related services to students with disabilities.

2. The FFSD and SSD are and have been, at all times relevant to this due process hearing proceeding, the local educational agencies ("LEA") responsible for providing Student with a free appropriate public education under IDEA.

3. The Three-Member Hearing Panel was validly constituted and has jurisdiction of Student's claims of violations of IDEA pursuant to 20 U. S. C. Section 1415 (e) (1997) and Section 162.961 RSMo 2000.

4. The Eighth Circuit has held that the burden of proof is on the school district to prove that its decisions were correct under IDEA. "At the administrative level, the District clearly had the burden of proving it had complied with the IDEA." E.S. v. Independent School District, No. 196, 135 F.3d 566, 569 (8th Cir. 1988). See also Blackmon v. Springfield R-XII School District, Springfield, Missouri, 198 F.3d 648, 658 (8th Cir. 1999); Independent School No. 284 v. A.C., 258 F.3d 769, 776 (8th Cir. 2001). While there is an argument for placing the burden on school districts only in those cases involving the adequacy of an IEP, we choose to place the burden on FFSD and SSD. We conclude that they have met the burden on all issues raised by Student and Parent.

5. In reaching the decision to deny eligibility, FFSD and SSD did not violate any procedural requirements of IDEA. There was no evidence that Student and Parent were not allowed to participate in the evaluation and eligibility determination process in an appropriate manner. They were represented by highly competent counsel throughout the process.

6. The criteria in Missouri for an initial determination of eligibility under the category of Emotional Disturbance are contained in the *Missouri State Plan for Special Education*. *Ex. J-99*. The criteria state that a child displays an emotional disturbance when:

A. through evaluation procedures that must include observation of behavior in different environments, and an in-depth social history the child displays one of the following characteristics:

- 1) an inability to learn that cannot be explained by intellectual, sensory or health factors;
- 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- 3) inappropriate types of behavior or feelings under normal circumstances;

4) a general pervasive mood of unhappiness or depression; and,

5) a tendency to develop physical symptoms or fears associated with personal or social problems.

B. the characteristic(s) must have existed to a marked degree and over an extended period of time. In most cases, an extended period of time would be a range from two (2) through nine (9) months depending upon the age of the child and the type of behavior occurring. For example, a shorter duration of disturbance that interrupts the learning process in a younger student might constitute an extended period of time. Difficulties may have occurred prior to the referral for evaluation;

C. the emotional disturbance adversely affects the child's educational performance.

As discussed later in more detail, we conclude that he does not meet the eligibility criteria for ED as set forth above. We reach this decision without using the SSD Eligibility Checklist.

7. Because Student does not meet eligibility criteria for an emotional disturbance, SSD and FFSD did not have reason to believe that Student was a child with a disability in the two years before the filing of the request for a due process hearing. Even if Student met eligibility criteria now, we find that the FFSD and SSD did not have reason to suspect that Student was a child with a disability before the hearing request was filed.

The federal regulations establish what Student and Parent must show in order to prevail:

(b) *Basis of knowledge*

An LEA must be deemed to have knowledge that a child is a child with a disability if —

(1) The parent of the child has expressed concern in writing (or

orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(2) The behavior or performance of the child demonstrates the need for these services, in accordance with Section 300.7;

(3) The parent of the child has requested an evaluation of the child pursuant to Sections 300.530-300.536; or

(4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system.

34 C.F.R. § 300.527(a), (b)(1)-(4). None of the four bases of knowledge exists here.

DISCUSSION

As noted in Conclusion of Law #6, the regulatory definition of Emotional Disturbance ("ED") prescribes the following four specific conditions to be satisfied for a student to be eligible for special education services as seriously emotionally disturbed: (1) exhibited one of the five listed symptoms, (2) "over a long period of time," and (3) "to a marked degree," and (4) that this condition adversely affects his educational performance. In Independent School District #284 v. A. C., 258 F. 3d 769 (8th Cir. 2001), the Court of Appeals, Eighth Circuit, gave this summary of the IDEA definition of ED:

Read naturally and as whole, the law and regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations.

Id., at 775-776.

Parent contends that Student has met two of the listed symptoms of ED in the regulatory scheme: (1) a general pervasive mood of unhappiness or depression and

(2) inappropriate types of behavior or feelings under normal circumstances.

There was no evidence of pervasive mood of unhappiness across all settings: none of the teachers saw the presence of it – the teachers and administrators testified to the opposite in great detail as described in the Findings of Fact; the Parent's deposition testimony clear shows a young man functioning well - loves school; gets up on his own after comparatively little sleep; takes care of his grandfather; picks up odd jobs to make spending money; has friends at school and in the neighborhood; gets along with other family members. See e.g., Springer v. Fairfax County School Board, 134 F. 3d 659 (4th Cir. 1998) (found that evidence did not show the depression to be pervasive); Los Angeles United School District, 31 IDELR 71 (SEA CA 1999) (holding that under IDEA the depression must be present in "most or all areas of the student's life).

Even if Parent established the alleged depression to be pervasive, the collective testimony from teachers and administrators leads to the conclusion that it did not impact his school performance. Student has continued to progress from grade to grade; with the exception of this first semester, his grades have been what was expected (and occasionally exceeded the expectations) for his low average IQ. His first semester (2004-2005 school year) admittedly dismal grades as a freshman are cause for concern but do not by themselves mandate special education. However, Student can do the homework when motivated – for example, he worked to attain sufficient credits to advance to high school. He has failed to take advantage of the after school tutoring – one of the many supports in place for general education students at McClure South Berkeley High School. See Austin v. Independent Sch. Dist. v. Robert M., 168 F. Supp. 2d 635 (W. D. Tex. 2001) . In *Austin*, the Court noted that "[w]hat Robert needed was to

commit to doing homework” and that “[w]hat Robert definitely did need was an understanding that the responsibility for Robert’s actions lies with Robert and the knowledge that good choices usually open good doors and bad choices usually open, and often compel entry through bad doors.” *Id.* at 639-640.

We similarly reject the contention that Student has displayed inappropriate types of behavior or feelings under normal circumstances. While his behavior has room for improvement, inappropriate behaviors must exist to a “marked degree and over an extended period of time” to qualify as an ED. Additionally, Student’s conduct was intentional and purposeful. See Mars Area Sch. Dist. v. Laurie L., 39 IDELR 96 (Pa. Commonwealth Court 2003)(finding no ED when the student made a choice to disobey adult directions and behaviors were self-promoting and intentional). Parent testified that Student can behave appropriately if he wants to and that he generally behaves appropriately. *FF#9*. According to Parent, Student gets angry but is pretty much the same as other kids in that regard. *FF#10*. She also testified that Student has neither physically harmed anyone nor destroyed property. *FF#10*. Perhaps, one of the reasons Student feels free to misbehave is this telling statement found in the UMSL evaluation: “When I get in trouble, my Mom gets me out.” See *footnote 4*. We also point out that FFSD has made certain supports available to him as a general education student, including a place to cool down when he finds himself getting angry – an option he has not needed to use according to his high school counselor, Ms. Strong. *FF#71*.

In summary, we do not find Student’s profile meets the criteria of someone with an abnormal emotional condition preventing him from choosing normal responses to normal situations. Independent School District #284 v. A. C., 258 F. 3d 769 (8th Cir. 2001). We also add that FFSD has maintained an admirable long-term commitment to

seeing that Student will have every opportunity to succeed in its district.

There was no evidence that FFSD and SSD had reason to suspect that Student was a child with a disability in the two years before the request for a due process hearing. Parent never expressed verbally or in writing that Student was in need of special education and related services. Neither Student's behavior or academic performance demonstrated that Student needed special education and related services. No employee of FFSD or SSD expressed a concern about Student's 's behavior or performance to appropriate personnel in accordance with child find or special education referral system before April 2, 2004.

DECISION

SSD and FFSD did not violate any provisions of the state standards and IDEA when it concluded that Student was not eligible for special education services. The entire hearing panel joins in this Decision without dissent.

APPEAL PROCEDURE

These Findings of Fact, Conclusions of Law, Decision and Order constitute a final decision in this matter. Any party aggrieved by the Decision of the Hearing Panel may, pursuant to Section 536 of the Missouri Revised Statutes, file an appeal to a state court within 30 days of the date of the Decision. An aggrieved party also has the option of pursuing a review of the Decision by the federal courts by filing a Petition within 30 days.

